United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1324

76-1324

To Be Argued By
John Nicholas Iannuzzi

UNITED STATES COURT OF APPEALS

For the SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v.-

JACK G. SCHWARTZ and GEORGE SARKIS, a/k/a "GEORGE,"

Appellants.

On Appeal From the Eastern District Court
For The Eastern District of New York

BRIEF ON BEHALF OF APPELLANT GEORGE SARKIS

JOHN NICHOLAS IANNUZZI
Attorney for Appellant
George Sarkis
233 Broadway
New York, New York 10007
(212) BA 7-9595

CONTENTS

Questions presented.....ii

The Subject Statute.....iii

The Proceedings Below.....1.

Statement of Facts.....2.

ARGUMENT .....7.

POINT I Federal Jurisdiction was Totally Lacking Herein.....7.

POINT II The Blatant Prejudice unnecessarily introduced into the Trial concerning organized crime mandates a new trial ..... 12.

POINT III The verdict was against the weight of evidence and should have been set aside ..... 13.

POINT IV 18 U.S.C. 894 was not intended to be invoked under the circumstances of the instant prosecution..14.

CONCLUSION .....15.

QUESTIONS PRESENTED

1. Was Federal Jurisdiction totally lacking herein. pursuant to 18 U.S.C. 894?

2. Was the prosecutor's reference to organized crime purposeful, intending to prejudice Appellants?

3. Regardless of prosecutor's intent, was the irrelevant reference by the prosecutor to organized crime prejudicial to the Appellants?

4. Was the verdict herein against the weight of evidence, particularly in view of Appellant's acquittal on the charges of conspiracy?

5. Was 18 U.S.C. 894 intended by Congress to be utilized in prosecutions similar to the instant prosecution?

THE SUBJECT STATUTE

"§894. Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection."
18 U.S.C. §894.

PROCEEDINGS BELOW

Appellant George Sarkis, hereinafter, on occasion, referred to as Sarkis, was indicted in the Eastern District of New York, together with the Co-Appellant Schwartz[1], charged with two substantive counts of obtaining extensions of credit through extortionate means, and a single count of a conspiracy so to do.

After trial before the Hon. Jacob Mishler, and a jury, the Appellants were acquitted of the conspiracy and one substantive count. The Appellant Sarkis was sentenced to 3 years imprisonment for the conviction based on the only other count, remaining at liberty, however,during the pendency of this appeal of the said judgment of conviction.

---

1. One, Grove Ebbert, was also indicted with Sarkis and Schwartz. He pled guilty to a superceding information and testified for the Government. One, Sy Roth, was named an un-indicted co-conspirator.

STATEMENT OF FACTS

Amongst other business enterprises, Appellant Schwartz, under the name GAINES SERVICE LEASING, INC., leased trucks to various independent (sometimes called gypsy) truckers. Gaines was not being paid by certain truck lesees, including one Fred McGhee.[2] Moreover, Gaines was unable to locate the leased equipment to repossess it; and, further, even if same could be located, McGhee,according to testimony, had a shotgun and had threatened to kill anyone who attempted to repossess the leased equpment (TR 1799).[3]

Grove Ebbert, who pled guilty herein and was a cooperating witness for the Government was the sole truck repossessor for Gaines. He testified that he had difficulty in the past with McGhee while repossessing equipment for companies other than Gaines.

Appellant Sarkis testified during trial that the witness Ebbert had confided to him that the difficulty in the past with McGhee included being physically bullied by McGhee's adult stepson.

During the spring of 1975, Appellant Schwartz spoke to a close friend and successful manufacturer, Jack Cohen, indicating certain business problems, including difficulties in repossessing his trucks from McGhee as a result of McGhee's threats and Ebbert's fear of McGhee from times past. Cohen mentioned to Schwartz

---

2. In as much as Appellant was acquitted of all charges save those relating to McGhee and a fire at McGhee's garage, this brief is confined to the events invovling McGhee.
3. Numerical reference to pages in the Trial Transcript.

that Appellant Sarkis had acted as a body-guard for Cohen's elderly father during a strike at Cohen's factory in Puerto Rico several years before (TR. 909-910). Thereafter, Cohen, on behalf of Appellant Schwartz, contacted Sarkis through Cohen's factory in Puerto Rico, asking Sarkis to come to New York to accompany Ebbert on his repossession rounds (Tr.913).

Appellant Sarkis testified that he felt honored to be able to do a favor for Jack Cohen, since Cohen was always solicitous of Sarkis and Sarkis's wife who has cancer, often gave Sarkis money to help him along, and was giving "life to an entire village" in Puerto Rico through the factory and the jobs it provided. For these reasons, Sarkis agreed to come to New York when Cohen asked the favor.

On April 21st, 1975 Sarkis was met at the Kennedy Airport by Cohen, Apppellant Schwartz, Mrs. Cohen and a woman friend of Schwartz. They proceeded to the Golden Gate Motel in Brooklyn where Schwartz had booked a room for Sarkis. The room was booked by Schwartz, who couldn't remember Sarkis's surname, in the name of George Schwartz. However the room was openly charged to Gaines. Moreover, the airline ticket was openly purchased in Sarkis's true name.

Cohen testified he never heard Schwartz tell Sarkis anything other than to accompany Ebbert while he attempted repossession, and protect him if necessary.

That same evening, Ebbert and Sarkis went to McGhee's home on 2 occasions, but were unsuccessful in seeing McGhee (Tr.369). McGhee was actually at home but hiding to foil his creditors. Ebbert and Sarkis then engaged in an evening of raucous drinking and carousing throughout Long Island and New York City. On the next morning, Tuesday, April 22, 1975, prior to going home from the night before, Ebbert and Sarkis visited McGhee again. This time they spoke to McGhee. Although Ebbert denied the same, various witnesses, including McGhee and Sarkis, testified that on the said morning of April 22, 1975, after a discussion concerning the equipment leased by McGhee, and a possible part payment, Ebbert told McGhee that he would break McGhee's legs if the payment was not made by Thursday of that same week.

On April 23, 1975, Appellant Sarkis visited Appellant Schwartz at Gaines Leasing Company and after a conversation indicating that Ebbert had not been shot and, apparently, McGhee was going to, at least partially, pay for the leased equipment, Appellant Sarkis was advised that fortunately since there was no trouble he could return to Puerto Rico. Appellant Sarkis returned to the Golden Gate Motel to arrange for his flight back to Puerto Rico. Sarkis found that there were no flights available that afternoon, and he booked passage for a flight that same evening. Meanwhile, Ebbert had apparently been to

Gaines on some business and was returning to Long Island. He stopped at the motel, telling Sarkis that he would drive him to Kennedy on his way to Long Island, thus saving any other Gaines employee the trip. When Sarkis advised Ebbert that the flight did not leave for several hours, Ebbert offered to take Sarkis to some bars on Long Island where women danced naked.

According to both Ebbert and Sarkis, they thereafter proceeded to many bars in Long Island. The drinking was heavy, each consuming between 12 and 15 drinks. Both testified that they were somewhat under the influence of alcohol; both testified that they were not thinking normally.

Sarkis testified that while Ebbert was driving from one bar to another, Ebbert stopped the car at a gas station and bought gasoline in a container,Sarkis indicated that he was dozing on and off, and the next thing he knew, they were back in front of McGhee's house. Sarkis testified that Ebbert indicated he wanted to get back at McGhee and his son for having humiliated him in the past. Sarkis testified he tried to stop Ebbert, but Ebbert ran to McGhee's garage, doused McGhee's car with gasoline and set the same afire.

Ebbert, on the other hand, testified that it was Sarkis, while in the bar who came up with the idea of burning down McGhee's garage. Ebbert agreed to everything about the drinking and

carousing,but testified that he drove Sarkis back to McGhee's at Sarkis's request; that he didn't know who bought the gasoline; and that he was not thinking normally at the time the fire was set.

No one other than Sarkis and Ebbert testified about the fire. Neither McGhee nor anyone in his family, nor anyone else, for that matter, testified to anything about the fire except seeing the garage burning. No one identified either Sarkis or Ebbert as having been near the scene of the fire.

Appellant Sarkis had no other involvement herein except the above indicated.

After April 23rd, 1975, McGhee, with recording equipment provided by the Suffolk County Police Department, had one conversation with Grove Ebbert and another with Appellant Schwartz. Recordings of these conversations were introduced into evidence. In both conversations. knowledge of the fire was denied.

Both Appellants were acquitted of any conspiracy planning the fire or any extorionate method of obtaining extensions of credit.

POINT I

FEDERAL JURISDICTION WAS TOTALLY LACKING HEREIN.

According to the testimony, there were only two persons in any fashion aware of the circumstances surroungind and prompting the fire which unquestionably destroyed part of McGhee's garage; those two persons were, of course, Appellant Sarkis and Grove Ebbert, the cooperating witness who pled guilty to a superceding indictment herein.

A perusal of the testimony of these two individuals clearly reveals that there is a basic lack of Federal jurisdiction. The criminal acts herein actually spelled out a simple arson (no attempt is being made to minimize nor ignore the gravity of such crime), jurisdiction over which belonged to the New York State courts.

Basic to the crime intended by Congress to fall within the parameters of 18 U.S.C. 894 is the use of extortionate means to collect or attempt to collect any extension of credit, or to punish someone for failing to give such extensions of credit. That is, a person must intend by his act to,directly or indirectly, threaten a person or persons with physcial harm in order to collect an extension of credit. Both elements-violence, and its specific use in connection with a collection of an extension of credit-must be present in order to spell out the federal crime.

In the instant case, however, a perusal of the only testimony concerning the impelling rationale behind the setting of the fire, that is, the testimony of Appellant Sarkis and Witness Ebbert, clearly indicates a total, complete lack of intent to collect an extension of credit, or punishment for failure to give such payment; a complete lack of any purpose whatever connected with extensions of credit, debts, the business of Gaines, McGhee's trucks, or anything else that would be absolutely essential to frame a Federal indictment for a violation of 18 U.S.S.894.

Indeed, both Sarkis and Ebbert are in agreement- and the jury acquittal, finding no conspiracy herein supports their testimony - that there was no prior plan to harm McGhee in any fashion, no prior plan to harm any of his property, nor any prior plan to in some fashion use phsycial violence to collect the debt owed by McGhee to Gaines. The jury found, in fact, neither Sarkis, Ebbert or Schwartz were involved in such a conspiracy, and indeed, inherent in such verdict of acquittal was a finding that there were no prior instructions, nor any plan to have anyone use violence or the threat of violence.in order to collect the said debts. (See Point II, Appellant Schwartz's Brief; Point III Infra).

Both Sarkis and Ebbert testified that the thoughts which first gave rise to the setting of the fire began well after the drinking bout began; that both men had already consumed

approximately 12 alcoholic drinks. True, each man blamed the other for the creation of the idea. But neither man testified that the said idea to burn McGhee's garage had anything whatever to do with collecting the debt owed to Gaines, or to punish McGhee for failing to pay such.

Ebbert testified that Sarkis merely said they should return to McGhee's house. On the way, according to Ebbert, they stopped at a gas station, although in his semi-drunken supor, Ebbert couldn't remember who actually purchased the gasoline, then proceeded to McGhee's house where the fire was started.

Sarkis testified that it was Ebbert who, while driving from one Go-Go bar to another, stopped at a gas station, purchased gasoline, and drove to the McGhee place, where the fire was set.

Neither man takes blame for the fire, Yet, whether either Ebbert or Sarkis set the fire, and, more, regardless of whether there was a fire or not, the facts herein are not sufficient to frame a federal crime pursuant to 18 U.S.C. 894. For each man specifically eliminates those qualities essential to framing the crime envisioned under the statute, to wit, an attempt by violence to collect extensions of credit.

It is respectfully submitted that an isolated, independent criminal act which causes a fire-set for personal, angry, vindictive, drunken, irrational purposes - not to collect a debt or to punish for failure so to do, is not either indictable or convictionable in the federal court pursuant to 18 U.S.C. 894.

In as much as the Sarkis-Ebbert testimony is the only evidence upon which the jury herein might make its determination, the Government fell short of its burden of proving beyond a

reasonable doubt that the elements necessary to comprise a violation of 18 U.S.C.894 were present in the instant case.

And, moreover, the finding of guilt by the jury is totally unsupported by any evidence whatever. If the jury, had, for instance, disbelieved Sarkis and believed instead, Ebbert, the testimony was merely that in the midst of a drinking bout, two drunks came up with an independent, vindictive, vicious, heartless idea to set a fire. But that is not sufficient to warrant conviction herein.

If, on the other hand, the jury chose to believe Sarkis and not Ebbert, the testimony would still be that in the midst of a drinking bout, two drunks came up with a mad, but independent idea to set a fire. If the jury chose to disbelieve both Sarkis and Ebbert, in part, or in full, there would be no evidence whatever to support the Government's position, since there was no other evidence as to how the fire occured.

Thus, while there is evidence of a fire herein, the rationale behind the said fire is, as were the minds of Sarkis and Ebbert on that night of the fire, rather cloudy, unclear, actually irrational. Such is sufficient, perhaps, for an arson charge on a State level, but not for a conviction pursuant to the instant statute.

Basic support for this position is given by the verdict of acquittal rendered by the jury herein on the charge of

conspiracy. The jury found, by such verdict, that the Appellants were not involved in any plan, scheme, agreement to punish McGhee for failing to pay, or to threaten McGhee into paying. This verdict, thus, supports the position of both Sarkis and Ebbert, that the fire was a spontaneous thought, hatched, as they both testified, after many too many drinks, over the edge of a bar, for drunken reasons of affront, humiliation, frustration, but not for the purpose of collecting extensions of credit or punishing someone for failing so to pay.

POINT II

THE BLATANT PREJUDICE UNNECESSARILY INTRODUCED INTO THE TRIAL CONCERNING CRGANIZED CRIME MANDATES A NEW TRIAL

The Point is in agreement with Point I of the Brief submitted on behalf of the Appellant Schwartz, and Appellant Sarkis wishes to urge those arguments contained in the brief of Appellant Schwartz as if hereat fully set forth in detail.

POINT III

THE VERDICT WAS AGAINST THE WEIGHT OF EVIDENCE AND SHOULD HAVE BEEN SET ASIDE

This Point is in agreement with Point II of the Brief submitted on behalf of the Appellant Schwartz, and Appellant Sarkis wishes to urge those arguments contained in the brief of Appellant Schwartz as if hereat fully set forth in detail.

POINT IV

18 U.S.C. 894 WAS NOT INTENDED TO BE INVOKED UNDER THE CIRCUMSTANCES OF THE INSTANT PROSECUTION

This Point is in agreement with Point III of the Brieg submitted on behalf of the Appellant Schwartz, and Appellant Sarkis wishes to urge those argume. ts contained in the brief of Appellant Schwart as if hereat fully set forth in detail.

CONCLUSION

For all the above reasons, it is respectfully submitted that the judgment of conviction should be reversed.

Respectfully submitted,

JOHN NICHOLAS IANNUZZI
Attorney for Appellant
George Sarkis

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

#76-1324

Appellee,

-v.-

AFFIDAVIT OF SERVICE

JACK G. SCHWARTZ and GEORGE SARKIS, a.k.a "GEORGE",

Appellants.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Jeanette Petrus, being duly sworn, deposes and says that deponent is over the age of 18 years, is not a part to the action and resides at 233 Broadway, County and State of New York.

That on the 7th day of September, 1976, the deponent served the Brief On Behalf Of Appellant, George Sarkis upon the United States Attorney for the Eastern District in the within action at the address designated by the said United States Attorney by depositing the same in a postpaid wrapper in an official depository of the United States Post Office in the State of New York.

Jeanette Petrus

Sworn to before me this 7th
day of September, 1976

Notary Public

RICHARD M. FEDROW
Notary Public, State of New York
No. 24-4618986
Qualified in Kings Co.
Commission Expires March 30, 1977